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OCTOBER TERM 1973

No. 73-183

RICHARD L. BRADLEY, *Petitioner,*

vs.

JAMES D. DOHERTY and Z. B. & M. ENTERPRISES, INC., dba THE ORCHID ROOM, *Respondents.*

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. THE PRESENT CASE IS APPROPRIATE FOR A REVIEW OF THE DOCTRINE OF IN PARI DELICTO

Respondents argue that this is not a proper case for the review of the doctrine of *in pari delicto* because, *inter alia,* Petitioner is in violation of California Penal Code §337(a), a felony.

Paragraph 337(a) of the California Penal Code provides that "every person" who engages in a prohibited list of activities, or any of them, is "punishable by imprisonment in the County Jail, for a period of not more than one year, or in the State Prison for a period not exceeding two years."

It is true that by the terms of California Penal Code Section 337(a) it applies to "every person", and accordingly, it was meant to apply to both parties. Indeed, if this statute alone were involved in the present case, the issue of *in pari delicto* would have been raised, in its pristine clarity. However, in the present case, §332 of the California Penal Code [via §489 of the California Penal Code] is also invoked. That section, sounding in fraud, calls for "not more than ten years of imprisonment in State Prison," and constitutes a separate enactment, aimed solely at the defrauding party.

It follows that in the present case, the California Legislature itself distinguished between treatment of those who are *in pari delicto,* under §337(a), and those who, in addition to engaging in a fundamentally similar activity of placing and receiving bets, engage also in an outright fraud. The Court below refused, however, to recognize the legislative enactment and chose to apply the doctrine of *in pari delicto* to any gambling activity even where one party to a game engages in an outright fraud. We contend that this decision, to apply the *in pari delicto* rule mechanically, is irrational. An irrational exclusion of the defrauded party from a reasonable opportunity of access to the courts and the protection of the law is not permissible under the Federal Constitution.

II. PETITIONER WAS A VICTIM, NOT A MERE PARTICIPANT. HE IS NOT SUING ON A GAMBLING CONTRACT, BUT MERELY SEEKING RESTITUTION OF MONEY TAKEN FROM HIM BY FRAUD. THIS HE WOULD HAVE BEEN ALLOWED TO DO AT COMMON LAW; HE SHOULD BE ALLOWED TO DO SO UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FEDERAL CONSTITUTION.

At least since the adoption of the Statute of Anne [9 Anne, Chapter 14, Section 1; see 4, *Bacon's Abridgment,* pp. 450 through 462], the courts have refused to let the winner recover from the loser when the loser refuses to pay. A defrauded loser, however, was allowed to sue at common law, independently of the Statute of Anne, both before and after the Statute's adoption. See, *Harris v. Bowden,* 1588, 78 Eng. Reprint 348; *Dufour v. Ackland,* 1830, 9 L.J.K.B. p. 3.

In *Wallace v. Opinham,* 73 Cal.App.2d 25, 155 P.2d 709, and in the present case, the Supreme Court of California failed to consider and adopt this distinction, as established in the common law and as adopted by many other jurisdictions in the United States. See 39 A.L.R.2d 1213, at 1216, Annotation, entitled "Recovery of Money or Property Lost Through Cheating or Fraud in Forbidden Gaming, Gambling or Game." See, also, *Katts v. Phelen,* 2 How. 376, 11 L.Ed. 306; *Stewart v. Right,* [C.C.A. 8th], 147 F. 321, and *Grim v. Cheatwood,* 208 Okla. 570, 257 P.2d 1049 [in all of which a distinction was made between the cheating winner, and the non-cheating loser.]

Since the present case comes to this Court on a Demurrer, the issue raised herein centers on the right

of a victim of fraud to recover under the most aggravated of circumstances. In support of *in pari delicto,* California must show some rational justification for the rule where (1) organized crime is involved on one side of the gambling; (2) where the victim is helpless like a child; where the parties are not *actually in pari* of the delict. We submit that the State did not and could not carry the burden.

III. THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION APPLY IN THIS CASE.

In *Reitman v. Mulkey,* 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed. 830 (1967), the Court considered a purportedly "neutral" provision of the California Constitution, intended to leave the State "uninvolved" vis-a-vis wholly private acts of racial discrimination in housing. The case involved a California Constitutional Initiative, which would have prohibited the State or any subdivision or agency thereof from denying, limiting or abridging directly or indirectly, the right of any persons willing or desirous of selling, leasing or renting, real property to decline to sell, lease, or rent such property to such person or persons as the prospective conveyor of real property in his absolute discretion chooses.

On its face, the measure merely denied potential plaintiffs access to the courts in cases of private housing discrimination. In the language of the Respondents' Brief in the present case, all California at-

tempted to do in the *Reitman* situation, was to "merely leave petitioner as the court found him." (See, Respondents' Brief, p. 4.) "Quite contrary to having interfered with him, the state here has done nothing at all." (Ibid.) This argument was rejected by both the California Supreme Court and by the United States Supreme Court. Both Courts found significant state involvement amounting to "State action" in the Initiative, which "encouraged" or "authorized" private discrimination.

In the present case, the Rule of *in pari delicto* is applied to bar access to the courts to individuals who, if allowed to, could show themselves not to be *in pari* with the hardened criminal. For the State to remain "neutral" in this situation is to lend State authority to exploitation of the ill by crime syndicates, by the powerful, the cunning and the vicious. It is "encouragement" and "authorization" and invitation to lawlessness. We can conceive of no rational state grounds for such action by the state.

The reference in the Opening Brief to "other jurisdictions" was not meant to suggest, as the Respondents argue in their brief, on page 4, "National conformity" in areas of substantive criminal law; it was meant to urge minimum standards for the right of access to the courts and it was meant to underscore the growing recognition in many states of the utter irrationality behind the rule of *in pari delicto.* We contend that it is as irrational to classify together the ill and the premeditating defrauder as it is to punish equally a child, enticed and submitting

to a sexual assault by an adult, and his molester. There is no rational basis to classify the two together and apply the rule of *"in pari delicto"*, where calculated fraud is perpetrated against a child-like, ill gambler.

Boddie v. Connecticut, 401 U.S. 371 (1971), striking down court fees in divorce actions by indigents, was decided on due process grounds. However, under the theory of equal protection, recent decisions of this Court suggest the same result. One recent equal protection test is whether "an appropriate governmental interest suitably furthered by the differential treatment" exists in the case. See, *Chicago Police Department v. Mosley,* 408 U.S. 92, at 95, and 99 (1972); *Webber v. Aetna Cas. & Sur. Co.,* 406 U.S. 1964 (1972); citing, *Reed v. Reed,* 408 U.S. 71 (1971); *Dunn v. Blumstein,* 405 U.S. 645 (1972); *James v. Strange,* 407 U.S. 128 (1972); *Jackson v. Indiana,* 406 U.S. 715 (1972); *Humphrey v. Cady,* 405 U.S. 504 (1972); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); and *Stanley v. Illinois,* 405 U.S. 645 (1972).

All these cases share in common the apparent unwillingness of this Court to accept un-meritorious claims of "rationality" by state legislatures in the face of state sanctioned denial of equality of treatment.

In each of these cases, arguments of a rational test were made and in each they were rejected as insufficient. In the present case, the California statutes specifically recognize the distinction between gambling

among equals and a fraudulent act by one of the gamblers. Otherwise, we would not have been dealing with two separate sections of the Penal Code of California. However, after the Legislature of California did recognize the distinction, the California Courts refused to qualify the doctrine of *in pari delicto* so as to make that doctrine inapplicable in cases of fraud. This, purely judicial construction of a doctrine never meant to apply in the most extreme factual situations of *non-in-pari* gambling, is supported neither by history, nor by policy, nor by common sense. We believe that closing access to the Courts indiscriminately, to all individuals involved in gambling, regardless of the degree of their involvement, regardless of their premeditation or illness, violates due process and equal protection clauses of the Constitution.

For the reasons outlined above, Petitioner respectfully submits that Petitioner's Petition for a Writ of Certiorari should be granted.

Dated, August 23, 1973.

Respectfully submitted,
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